

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 10, 2019 appellant, then a 21-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she sustained a concussion and facial lacerations on April 26, 2019 when she was involved in a roll-over motor vehicle accident while in the performance of duty. On May 22, 2019 OWCP accepted the claim for laceration without foreign body of other part of head and concussion with loss of consciousness of unspecified duration. On July 18, 2019 it expanded the acceptance of the claim to include contusion of the right thigh and other intervertebral disc displacement of the thoracic region. On October 28, 2019 OWCP further expanded its acceptance of the claim to include neoplasm of uncertain behavior of connective and other soft tissue. It paid appellant wage-loss compensation for total disability on the supplemental rolls from June 12, 2019 through January 4, 2020 and on the periodic rolls from January 5, 2020 through January 30, 2021.

In an operative report dated February 7, 2020, Dr. Richard Buch, a Board-certified orthopedic surgeon, noted that he performed wound irrigation, debridement, and placement of vacuum assisted closure (VAC) for appellant's right thigh hematoma and seroma. Intraoperatively, he documented multiple small pockets of fluid indicative of chronic edema and swelling. Dr. Buch noted that he placed the wound VAC to dissipate the fluid over time.

In a work-capacity evaluation (Form OWCP-5c) dated April 16, 2020, Dr. Chukwuma Osuagwu, a Board-certified internist, indicated that appellant was capable of returning to work full time. He noted diagnoses of head laceration and concussion.

In a letter dated June 30, 2020, OWCP notified appellant that it had scheduled an August 3, 2020 second opinion examination with Dr. Jack H. Henry, a Board-certified orthopedic surgeon, to determine the status of her accepted employment injury. It explained that her entitlement to compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letters also contained the date, time, and location of the appointment and were mailed to appellant's address of record in the ordinary course of business. In a subsequent letter dated August 6, 2020, the appointment was rescheduled to September 16, 2020. The September 16, 2020 appointment was later canceled.

In a financial disclosure statement (Form CA-1032) dated September 24, 2020, appellant reported her return to private sector work on July 20, 2020 including her hourly rate of pay and the name and address of her new employer.

On October 13, 2020 OWCP sent appellant a development letter requesting information regarding her private sector employment, including her job title and description of duties performed, number of hours worked per week, inclusive dates of employment, and weekly rate of pay. Appellant was afforded 30 days to respond.

On November 18, 2020 OWCP received appellant's private sector pay records for the periods July 20 through October 2, 2020 and October 17 through 30, 2020.

In a letter dated January 21, 2021, OWCP notified appellant that she was being referred for a second opinion examination on March 10, 2021 with Dr. Vinod Kumar Panchbhavi, a Board-

certified orthopedic surgeon, to determine the status of her accepted employment-related conditions. Appellant was again informed of her obligations to attend and cooperate with the examination and it was explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letter also contained the date, time, and location of her appointment and was mailed to her address of record.

In e-mails dated January 21, 2021, T.H., a supervisor with the employing establishment, advised an OWCP claims examiner, that appellant had resigned from her position with the employing establishment effective May 19, 2020. In response, the claims examiner advised that the second opinion examination was scheduled because the treating physician had listed only two of the accepted conditions in his full-duty release.

In a letter dated January 28, 2021, OWCP contacted appellant's private employer requesting information regarding appellant's employment, including her job title and description of duties performed, number of hours worked per week, inclusive dates of employment, and weekly rate of pay. The response deadline was not indicated in the letter. In a separate letter of even date, OWCP requested similar information from appellant. Appellant was afforded 30 days to respond.

The record contains a January 28, 2021 compensation termination worksheet calculating an overpayment of compensation in the amount of \$8,841.25 for the period July 20, 2020 through January 30, 2021. In a February 1, 2021 preliminary overpayment determination, OWCP advised appellant of its finding that she had received an overpayment of compensation in the amount of \$8,841.25 for the period July 20, 2020 through January 30, 2021 because she received compensation for total disability after she returned to work in the private sector. It further notified her of its preliminary finding that she was at fault in the creation of the overpayment, because she accepted a payment that she knew, or reasonably should have known, to be incorrect. Additionally, OWCP provided appellant with an overpayment action request form and informed her that within 30 days she could request a telephonic conference, a final decision based on the written evidence, or a prerecoupment hearing. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses.

On March 1, 2021 appellant submitted a completed Form OWCP-20, indicating no monthly income, total monthly expenses of \$1,400.00, and assets totaling \$4,200.00. She attached a statement explaining that her private sector hire date was July 20, 2020, but that she had not begun working full time until September 8, 2020. Appellant further noted that she was not capable of returning to work for the employing establishment, because she was unable to perform the amount of movement and heavy lifting involved in her position.

On March 17, 2021 Dr. Panchbhavi advised OWCP that appellant had not attended the March 10, 2021 appointment.

In a notice dated March 18, 2021, OWCP proposed to suspend appellant's wage-loss compensation and medical benefits as she failed to attend the medical examination scheduled for March 10, 2021. It afforded her 14 days to respond in writing with an explanation as to why she

failed to attend the examination with Dr. Panchbhavi. OWCP advised that, if good cause was not established, appellant's compensation benefits would be suspended pursuant to 5 U.S.C. § 8123(d) until she attended and fully cooperated with the examination. It instructed her to contact OWCP immediately if she intended to report to a rescheduled examination with Dr. Panchbhavi. Appellant did not respond within the afforded period.

By decision dated May 11, 2021, OWCP suspended appellant's wage-loss compensation and medical benefits effective that date, pursuant to 5 U.S.C. § 8123(d), due to her failure, without good cause, to attend the medical examination scheduled for March 10, 2021.

By decision dated July 14, 2021, OWCP finalized the preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$8,841.25 for the period July 20, 2020 through January 30, 2021 because she continued to receive wage-loss compensation following her return to work. It determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP ordered appellant to repay the \$8,841.25 overpayment in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.²

OWCP's regulations provide in pertinent part: "Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."³ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.⁴ OWCP's procedures also provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁵

OWCP's procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁶ The formula for determining loss of wage-earning capacity based on actual earnings,

² *Supra* note 1 at § 8102(a).

³ 20 C.F.R. § 10.500.

⁴ *See J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁵ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (September 2018).

⁶ *See L.J.*, Docket No. 14-0970 (issued August 21, 2014); *id.* at Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

developed in the *Albert C. Shadrick* decision,⁷ has been codified at section 10.403 of OWCP's regulations. If the claimant is entitled to compensation for partial wage loss after returning to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.⁸

ANALYSIS -- ISSUE 1

The Board finds that the fact of overpayment has been established in this case.

OWCP continued to pay appellant wage-loss compensation for disability through January 30, 2021, after she had returned to work. As noted above, a claimant is not entitled to receive compensation for disability during a period in which she had actual earnings.⁹ Therefore, an overpayment of compensation was created in this case.¹⁰

The Board further finds, however, that this case is not in posture for decision with regard to the period and amount of the overpayment. In the February 1, 2021 preliminary notice, OWCP determined the overpayment of compensation to be \$8,841.25 for the period July 20, 2020 through January 30, 2021. It failed to complete development regarding the nature of appellant's return to work in the private sector despite the evidence of record suggesting that she did not return to full-time work until September 8, 2020. OWCP further failed to apply *Shadrick*¹¹ in calculating appellant's overpayment. As such, the period and amount of the overpayment are not in posture for decision.¹²

The case will be remanded to OWCP for recalculation of the period and amount of the overpayment, to be followed by a new preliminary determination of overpayment and a *de novo* overpayment decision.¹³

LEGAL PRECEDENT -- ISSUE 3

Section 8123 of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.¹⁴ The determination of the need for an examination, the type of examination, the choice of locale, and

⁷ 5 ECAB 376 (1953); 20 C.F.R. §§ 10.403(d)-(e).

⁸ *Supra* note 6 at Chapter 2.815.3(b) (June 2013). *Albert C. Shadrick, id.; P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

⁹ *Supra* note 5.

¹⁰ *Supra* note 6.

¹¹ *Supra* note 8.

¹² *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *D.W.*, Docket No. 10-0361 (issued December 23, 2010).

¹³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

¹⁴ 5 U.S.C. § 8123.

the choice of medical examiners are matters within the province and discretion of OWCP.¹⁵ OWCP's regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.¹⁶ Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.¹⁷ OWCP's procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.¹⁸ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective May 11, 2021, due to her failure to attend a scheduled medical examination.

In a letter dated January 21, 2021, OWCP notified appellant that she was being referred for a second opinion examination on March 10, 2021 with Dr. Panchbhavi to determine the status of her accepted employment-related conditions. The letter informed her of her obligations to attend and cooperate with the examination and explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letter also contained the date, time, and location of appellant's appointment.

Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.²⁰ The March 10, 2021 letter was sent to appellant's address of record and is presumed to have been received by her absent any notice of nondelivery. She has not submitted evidence to rebut this presumption.

Appellant did not appear for the March 10, 2021 appointment, nor did she attempt to reschedule the appointment prior to the designated time. In a notice dated March 18, 2021, OWCP provided her 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. Appellant did not respond.

As appellant did not attend the examination as scheduled and failed to provide good cause for failing to appear within 14 days of OWCP's March 18, 2021 notice of proposed suspension,

¹⁵ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

¹⁶ 20 C.F.R. § 10.320.

¹⁷ 5 U.S.C. § 8123(d); *see also id.* at § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

¹⁸ *Supra* note 8 at Chapter 2.810.13d (September 2010).

¹⁹ *Id.* at Chapter 2.810.13e.

²⁰ *See James A. Gray*, 54 ECAB 277 (2002).

the Board finds that OWCP properly suspended her wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective May 11, 2021.²¹

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation was created. The Board further finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment. The Board further finds that OWCP properly suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d), effective May 11, 2021, due to her failure to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board. It is further ordered that the May 11, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 26, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²¹ See *G.R.*, Docket No. 20-0915 (issued January 29, 2021).